**GOPAL A/L KUNCHI KANAN**

**v.**

**SURUHANJAYA PELABUHAN PULAU PINANG**

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[ORIGINATING MOTION NO. 25-29-94]
4 MAY 1995

***PRACTICE & PROCEDURE:*** *Certiorari - Application to set aside order for leave to apply for certiorari granted to applicant - Application for leave made after applicant's appeal against dismissal rejected by Board of Inquiry - Whether application for leave time barred under O. 53 r. 1A of the Rules of the High Court 1980 - Whether applicant required to exhaust all domestic remedies before seeking recourse to O. 53.*

On 15 June 1994, the applicant obtained an order for leave to apply for an order of *certiorari* to quash the decision of the Board of Inquiry, Suruhanjaya Pelabuhan, Pulau Pinang (the Board) held on 22 April 1988 which found the applicant guilty of misconduct. The applicant's appeal against the decision of the Board was dismissed on 4 March 1994. The respondent applied to set aside the order granting leave on the grounds that the application for leave was time barred under O. 53 r. 1A of the Rules of the High Court 1980 (RHC) and that even if the applicant was within time if required by law to exhaust all domestic remedies before applying for leave; meaning that the operative date would then be 4 March 1994, the applicant should not have waited until all such remedies had been exhausted as O. 53 r. 1A gives the Court discretion to allow an adjournment pending the determination of an appeal.

Counsel for the applicant contended that the applicant had been greatly prejudiced by the inordinate delay in the disposal of the appeal by the respondent who had informed the applicant of the Board's finding of guilt on 6 March 1992 i.e. 4 years from the inquiry. The applicant had appealed within the stipulated period, but was only informed of the results of the appeal on 4 March 1994. Counsel also contended that even if there was delay, the Court could still grant leave upon a satisfactory explanation which the applicant had provided in his affidavit accompanying his application for leave. Furthermore, he submitted that the respondent who was responsible for the delay should not be allowed to use the issue of delay to their advantage.

**Held:**

**[1]** On account of the respondent's own conduct, the Court adopted the view that the date taken for the purposes of O. 53 r. 1A ought to be 4 March 1994 as until then the applicant had reason to entertain hopes of his appeal being successful. The respondent was responsible for the gross delay in finalizing the in-house procedure and should not be allowed to use such delay as a sword and a shield at the same time. The conduct of the respondent is highly pertinent when the Court considers whether or not to exercise its discretion to grant leave under O. 53.

**[2]** Even if there was delay, the reason was explained to the satisfaction of the Court when leave was sought.

**[3]** The more flexible approach in the use of the prerogative power in O. 53 r. 1A - which gives the Judge the discretion to "adjourn the application for leave until the appeal is determined or the time for appealing has expired" - would give the applicant the option

of, either to wait for the final resolution of all the in-house remedies or prescribed administrative means of redress e.g. an appeal available to him, or to embark upon an application under O. 53 at some stage after the initial decision was made, but before he had exhausted all such in-house or administrative redress available.

*[Application to set aside order for leave dismissed with costs].*

**Cases referred to:**
*Lai Chen Cheong v. Sowaratnam [1983] 2 MLJ 113* ***(refd)***
*Sugumar Balakrishnan v. Chief Minister of State of Sabah & Anor. [1989] 1 MLJ 233* ***(refd)***
*Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor. [1983] 2 MLJ 54* ***(refd)***
*Melayu Raya Press Ltd. [1951] 17 MLJ 89* ***(refd)***
*Badat bin Drani v. Tan Kheat [1953] 19 MLJ 67* ***(refd)***
*Government of Malaysia & Anor. v. Jagdish Singh [1987] 2 MLJ 185* ***(foll)***

**Legislation referred to:**
Rules of the High Court, O. 53 rr. 1, 1A
Penang Port Commission Act 1955 (Revised - 1974), s. 18(3)

*For the applicant - Arjan Singh; M/s. Jagjit Singh & Co.*
*For the respondent - Ramsen Ho; M/s. Lim Huck Aik & Co.*

**JUDGMENT**

**Vincent Ng Kim Khoay J:**

The applicant had on 15 June 1994 obtained leave from my predecessor to apply for an order of *certiorari* to quash the decision of the Board of Inquiry, Suruhanjaya Pelabuhan, Pulau Pinang (the Board) held on 22 April 1988 which eventually resulted in the applicant being informed on 4 March 1994 that his appeal to the Board had been dismissed.

Before me, was the respondent's undated application *vide* Enc. 8 filed on 16 September 1994 to set aside the said leave obtained by the applicant on 15 June 1994. It may thus be pertinent to note here that this application concerns the granting of leave to apply for an order of *certiorari* rather than the substantive motion for *certiorari*.

The sole contention of the respondent in Enc. 8 is that the applicant's application for leave was pegged on the wrong date and in any event it was time barred under O. 53 r. 1A of the Rules of the High Court. It was pegged on the wrong date as the decision sought to be impugned was not delivered by the Board of Inquiry on 22 April 1988, but on 6 March 1992 when the applicant was informed by a letter of even date that he was found guilty of misconduct by the Board (Exh. G8 of Enc. 5). It was however conceded by the respondent that, the applicant would be within time if, he is required by law to exhaust all in-house remedies or administrative means of redress before he is allowed to make an application for leave to issue an order of *certiorari*, as the operative date of the decision would then be on 4 March 1994 when he was informed that his appeal was rejected by the Board. It was however contended by Counsel for the respondent that the applicant should not have waited until all such remedies or redress have been exhausted before his recourse to O. 53 r. 1, as r. 1A thereof also provides that "where the proceeding is subject to appeal, the Court or Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired". In the current case, the time for appealing was to expire after the lapse of 14 days from 6 March 1992, but the

applicant had lodged his appeal well within time. Three cases were cited in support of this contention, namely *Lai Chen Cheong v. Sowaratnam* [1983] 2 MLJ 113, *Sugumar Balakrishnan v. Chief Minister of State of Sabah & Anor.* [1989] 1 MLJ 233 and *Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor.* [1983] 2 MLJ 54.

In reply, Counsel for the applicant said that though the domestic enquiry was held on 22 April 1988 and the applicant was informed that he was found guilty of misconduct by the Board on 6 March 1992 - which was almost four years later - he had nevertheless on 18 March 1993, as advised by the respondent, appealed against the decision, within the aforesaid time frame of 14 days. However, neither the applicant nor his Counsel was informed by the respondent on the outcome of the appeal, or when the appeal was heard or when the decision was made, (despite having received three reminders from the applicant) until 4 March 1994, *vide* letter of even date from the respondent to the applicant's Counsel, which informed him that his appeal had been rejected. The applicant's vital interest was thereby highly prejudiced due to this inordinate delay in disposal of the appeal. Hence, according to Counsel, the Court ought to hold that the finality of the respondent's decision occurred on 4 March 1994, as, until that date, there was still hope that the applicant may succeed in his appeal.

It was further contended that in the absence of any evidence to the contrary, and failure of response from the respondents, the first decision could be deemed to have been made on 22 April 1988 and the final decision on 4 March 1994. Even if the date 6 March 1992 is taken and there was delay, the Court may yet grant leave if the delay is explained to the satisfaction of the Court. And such delay, if any, had been sufficiently explained by the applicant, in his affidavit affirmed on 15 April 1994 (Enclosure 2), to the satisfaction of the Court, when leave was first sought. And, as it was the respondent themselves who were responsible for the delay they should not be allowed to use this delay to their advantage.

I dismissed the respondent's application with costs to the applicant for the following reasons:

a) On account of the respondent's own conduct, the Court could not but adopt the view that the finality of the respondent's decision occurred only on 4 March 1994, when the applicant was informed of the outcome of his appeal to the Board under s. 18(3) of the Penang Port Commission Act, 1955 (Revised - 1974). Thus, the date taken for purposes of O. 53 r. 1A, ought to be 4 March 1994, as until then the applicant had reasons to entertain hopes of his appeal being successful. In this regard, I wholly agree with the submission of applicant's Counsel that it was the respondent who was responsible for the gross delay in finalizing the in-house procedures, and should not be allowed to use such delay as a sword and a shield at the same time. The conduct of the respondent is highly pertinent when the Court considers whether or not to exercise its discretion to grant leave under O. 53.

(b) Even if there was delay, the reason for such delay was explained to the satisfaction of the Court *vide* paragraphs 15 to 22 of Enc. 2, when leave was first sought, and the Court could and did exercise its discretion in favour of the applicant when it granted leave on 15 June 1994.

(c) I do not agree with the submission of Counsel for the respondent that the applicant should not have waited until all the in-house remedies have been exhausted before making the application for leave under O. 53. Both in *Melayu Raya Press Ltd.* [1951] 17 MLJ 89, *Badat bin Drani v Tan Kheat* [1953] 19 MLJ 67 it was held that until

the applicants had exhausted their right of appeal or the prescribed administrative or statutory means of redress he is precluded from applying for *certiorari*. This was the prevailing law from 1951 until 1983, when the Federal Court in *Lai Cheng Cheong (supra)* took a different view when it was held that an applicant for *certiorari* is not normally obliged to have exhausted his right of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a Court of law before recourse to writ remedy. Though, in a subsequent Supreme Court decision, in *Government of Malaysia & Anor. v. Jagdish Singh* [1987] 2 MLJ 185, while not disagreeing with the *ratio* in *Lai Cheng Cheong (supra)*, the panel took a slightly different view when it held that *certiorari*, which comes under the review jurisdiction, would not normally be issued where there is another avenue or remedy open to the applicant, save only in very exceptional circumstances. The rationale is that the applicant should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction. However, the decision in *Jagdish Singh* also reiterated the trite law that judicial review is always at the discretion of the Court and further articulated the view that it is not an invariable rule that if an appeal lies to a higher tribunal the Court would refuse a judicial review remedy. Hashim Yeop Abdullah Sani SCJ (as he then was) then went on to say as follows:

> However, it can hardly be missed that in recent years the law on judicial review has made tremendous progress and the Courts are now more flexible in the use of the prerogative powers to check excess or abuse of powers.

I would fully associate myself and agree with this *dicta*, which goes to further reassert the flexibility of the Courts on matters such as this. And, it is thus my view that, the more flexible approach in the use of prerogative power as postulated by Hashim Yeop Abdullah Sani CJ when considered in the light of the peculiar wording in O. 53 r. 1A which gives the Judge the discretion to "adjourn the application for leave until the appeal is determined or the time for appealing has expired" - would give the applicant the option of, either to wait for the final resolution of all the in-house remedies or prescribed administrative means of redress e.g. an appeal available to him, or to embark upon an application under O. 53 at some stage after initial decision made, but before he had exhausted all such in-house or administrative redress available. This state of the law ought to prevail as it is a sensible approach to take, and Counsel for the respondents could not cite any binding authority to support his contention that the applicant should not have waited until the final resolution of all his in-house or prescribed administrative redress before applying for such leave.